No. 12360.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN O. PRICKETT, H. F. WINANS and S. E. WORTHEY, on behalf of themselves and other employees similarly situated,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

APPELLANTS' OPENING BRIEF.

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I.

Basis of Original and Appellate Jurisdiction.

This action was filed pursuant to the provisions of Section 16(b) of the Fair Labor Standards Act of 1938, hereinafter sometimes referred to as the Act.[1] Jurisdiction vested in the District Court by that section and by Section 24(8) of the Judicial Code (28 U. S. C., Sec. 41(8)). Section 2 of the Portal-to-Portal Act of 1947[2] did not withdraw jurisdiction of the claims of the appellants herein.

This Court has jurisdiction of the appeal under the provisions of Section 128 of the Judicial Code (28 U. S. C., Sec. 225).

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[1]Public Law No. 718, 75th Cong., Chap. 676; 52 Stat. 1060-1069 (1938); 29 U. S. C., Secs. 201-219.

[2]Public Law No. 49, 80th Cong., Chap. 52.

II.

Statement of the Issue.

The question involved in this appeal is the following: In an action under the Fair Labor Standards Act, filed before the effective date of the Portal-to-Portal Act of 1947, was it necessary to file, within 120 days of that date, the "written consents" of the employees alleged to have been similarly situated with the plaintiffs originally named, where those employees were named in a Bill of Particulars filed pursuant to Court order within said 120 days?

This issue was raised by the suggestion of the trial court during a pre-trial hearing held on March 7, 1949, that the plaintiffs would be required to file written consents to appear as parties plaintiff, following which, upon the filing of such written consents, the Court granted defendants' motion to dismiss as to the "employees similarly situated" on the ground that they had not filed such written consents within 120 days of the enactment of the Portal-to-Portal Act.

III.

Statement of Facts.

On January 16, 1947, a claim was filed for overtime compensation alleged to be due under the Fair Labor Standards Act of 1938 by Glenn O. Prickett, H. F. Winans and S. E. Whitney "on behalf of themselves and other employees similarly situated, Plaintiffs." The first paragraph in said complaint alleged that plaintiffs brought the action "on behalf of themselves and all other employees similarly situated." [Tr. p. 2.]

On April 11, 1947, defendant filed its Notice of Motions to Dismiss the Action, to Strike Certain Matters from the Complaint, and in the Alternative for a More Definite Statement and Bill of Particulars. [Tr. p. 5.] The latter motion sought to obtain detailed information concerning the work and identity of each "plaintiff and claimant."

On May 12, 1947, said motions were argued and the Court struck from the calendar the motions to dismiss and to strike and granted the motion for a Bill of Particulars. [Tr. p. 10.]

On May 14, 1947, the Portal-to-Portal Act of 1947 was signed by the President and became effective.

On June 5, 1947, the plaintiffs filed their Bill of Particulars in which each of the plaintiffs including the employees similarly situated were named, their duties and nature of their claims given and otherwise the particulars called for by defendants' motion furnished. [Tr. pp. 11-14.]

Thereafter on June 16, 1947, the defendant filed its answer. [Tr. p. 14.]

On March 7, 1949, a pre-trial hearing was held during which the Court indicated that the plaintiffs would be required to file an Amended Complaint to allege additional jurisdictional facts required by the Portal-to-Portal Act, and to file written consents on the part of the employees similarly situated. This was done on April 6, 1949.

On May 5, 1949 the defendant moved to dismiss the claims of the plaintiffs other than those who were originally named in the caption of the first complaint on the ground that they "did not become parties plaintiff herein within one hundred twenty days (120) of the enactment of the Portal-to-Portal Act of 1947." This motion was granted on May 23, 1949, and a formal order of dismissal as to the appellants herein was entered September 8, 1949.

The appellants are Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raferty, Charles E. Smith-Sanford, Samuel D. Tinker and Luther M. Walters.

IV.

Summary of Argument.

Section 8 of the Portal-to-Portal Act required the filing of written consents to become parties plaintiff only by those employees who had not appeared and became parties plaintiff either before the passage of the Portal-to-Portal Act or within 120 days thereafter. Each of the appellants herein became parties plaintiff at the time the action was first filed. At all events, they were named as parties plaintiff on June 5, 1947, which was within 120 days after the Portal-to-Portal Act went into effect.

V.
ARGUMENT.

1. The Cause of Action of Each Employee is Separate and Distinct From His Fellow and Therefore Each "Employee Similarly Situated" Is a Plaintiff.

Long before the passage of the Portal-to-Portal Act of 1947, the courts had occasion to consider the nature of the so-called "representative" actions filed under the Fair Labor Standards Act.

It was uniformly held that these actions were not true representative or class actions in the commonly understood sense of the term. They were frequently referred to as "spurious class actions." The courts pointed out that in a true class action, the cause of action of each of the members of the class is identical and all of the members of the class are bound by the judgment. Under the Fair Labor Standards Act, however, the claims which were joined in a single action, while similar, were not identical. The causes of action were several and the judgments several. Frequently, judgments were rendered in favor of one or more employees and against others in the same action. Discussion of these problems is well presented in

Pentland v. Dravo Corp., 152 F. 2d 851, affirming 4 F. R. D. 350.

See also in this connection:

Tenn, C. I. & R. Co. v. Muscoda Local, 5 F. R. D. 174;

Fink v. Oliver Iron Mining Co., 65 Fed. Supp. 316;

Smith v. Stark Trucking Co., 53 Fed. Supp. 826.

Accordingly, it is obvious that each employee similarly situated is a plaintiff as to his own cause of action.

2. **The Naming of Appellants in the Bill of Particulars Was Equivalent to Naming Them as Plaintiffs in Their Original Complaint.**

Rule 12(e) of the Rules of Civil Procedure specifically provides "A bill of particulars becomes a part of the pleading which it supplements." Numerous cases have interpreted and given effect to this provision. See for example the following:

> *Christianson v. West Publishing Co.,* 53 Fed. Supp. 454 (Aff'd, 149 F. 2d 202 (1945));
>
> *Cox v. Doherty,* 1 F. R. D. 564 (D. C. Cal. 1941);
>
> *Sheehan v. Municipal Light & Power Co.,* 1 F. R. D. 256 (S. D., N. Y., 1940).

The Bill of Particulars does not supersede the Complaint but simply limits it and makes its allegations more definite and certain.

> *Abel v. Munro,* 27 Fed. Supp. 346 (E. D., N. Y., 1939).

Accordingly, when in this case the caption and the body of the Complaint recited that three named individuals and other employees similarly situated were the plaintiffs and the Bill of Particulars filed pursuant to Court order named all of the employees similarly situated, it is manifest that all of these employees were named as parties plaintiff.

3. **All of the Appellants Were Named as Parties Plaintiff Within 120 Days of the Effective Date of the Portal-to-Portal Act and, Therefore, They Were Not Required to File Written Consents.**

The Portal-to-Portal Act of 1947 became effective May 14, 1947.

Section 5, banning representative actions, applied specifically to actions brought on or after the effective date of the Portal-to-Portal Act.

Section 6 established a two year Statute of Limitations for causes of action accruing on or after the date of the Act, and to causes of action accruing prior to the effective date but not filed upon until after 120 days thereafter.

Section 8 deals with pending collective and representative actions and is the only section applicable to the issue here involved. That section is as follows:

> "Sec. 8. Pending Collective and Representative Actions—The statute of limitations prescribed in section 6(b) shall also be applicable (in the case of a collective or representative action commenced prior to the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended) to an individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of one hundred and twenty days after the date of the enactment of this Act. In the application of such statute of limitations such action shall be considered to have been commenced as to him when, and only when, his written consent to become a party plaintiff to the action is filed in the court in which the action was brought."

It is clear from a reading of this section that the two year statute of limitations prescribed in Section 6(b) applies in a pending collective or representative action only "to an individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of 120 days after the enactment of this Act." The second sentence dealing with written consents just as clearly applies only to the individual claimant who has not been specifically named as a party plaintiff within that period. Where the individual claimant has been named, Section 6(b) does not apply and there is no requirement that his written consent be filed.

This precise point has been considered by two Circuit Courts of Appeal and in each instance the interpretation here urged has been adopted.

In *Central Mo. Telephone Co. v. Conwell* (C. C. A. 8, 1948), 170 F. 2d 641, it appeared that Miss Conwell had filed the action on behalf of herself and a co-employee "similarly situated." The co-employee, Laura Pinkepank did not appear as party plaintiff in the caption of the Complaint but was so described in the body of the Complaint. The court below (76 Fed. Supp. 398) held that Laura Pinkepank was named within the 120 day period and it was not necessary, therefore, for her to file a written consent. The court on appeal affirmed this ruling and stated that under section 8 it was sufficient for Laura Pinkepank to have been described in the body of the complaint as the plaintiff and the statute of limitations prescribed by the Portal-to-Portal Act was not applicable to her.

In *Gibbons v. Equitable Life Assurance Society* (C. C. A. 2, 1949), 173 F. 2d 337, the complaint was filed by Mr. Gibbons in October of 1944 alleging that eight named employees had authorized him to file the action on their

behalf. On September 23, 1947, the court below granted defendant's motion to dismiss the action of the 8 named employees because they had not filed written consents within the 120 day period. On appeal the order was reversed, the court pointing out that Section 8 does not apply to actions filed before May 14, 1947, where the claimants are named as parties plaintiff. The court held that if the 8 were named they did not have to file written consents. The defendant's contention that the 8 were not specifically named as parties plaintiff was dismissed by the Circuit Court as "purely technical," the court saying:

> "To hold that they were not named as plaintiffs would involve refinements of reasoning and disregard of the real facts that would not be in accord with any sensible or even rational interpretation of the complaint or the answer or the acts of the parties taken as a whole."

The court said that it was sufficient that the complaint stated their names, described their claims and indicated that the action was brought on their behalf.

Similar results have been reached by several District Court decisions.

Bartels v. Sperti, Inc. (S. D., N. Y., 1947), 13 Labor Cases, par. 63994;

Bartels v. Piel Bros., Inc. (E. D., N. Y., 1947), 74 Fed. Supp. 41.

See:

Carvalho v. John Doe, dba *Byrne Organization* (D. C. Hawaii 1947), 7 F. R. D. 469;

Cook v. American Viscose Corp. (S. D., N. Y., 1947), 13 Labor Cases, par. 64,168;

Sadler v. Dickey Clay Mfg. Co. (W. D. Mo., 1947), 73 Fed. Supp. 690.

Conclusion.

The cases clearly establish that each individual employee whose claim is presented in an action under Fair Labor Standards Act is a plaintiff. The Bill of Particulars becomes a part of the pleading to which it refers. In this case each of the appellants were named in a Bill of Particulars filed on June 5, 1947, which was within the 120 day period mentioned in Section 8 of the Portal-to-Portal Act. Accordingly, each of the appellants was named as a party plaintiff within that period.

Section 8 of the Portal-to-Portal Act does not require the filing of written consents on behalf of the employees who were named as the appellants were in this case.

Accordingly, it was error to dismiss their claims and the order of the court below should be reversed.

Respectfully submitted,

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Attorneys for Appellants.